

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	
BellSouth Telecommunication Inc.)	WC Docket No. 02-304
Tariff FCC No. 1, Transmittal No. 657)	

OPPOSITION TO DIRECT CASE

**ALLEGIANCE TELECOM, INC.,
CABLE & WIRELESS,
ITC^DELTA COM COMMUNICATIONS, INC.,
KMC TELECOM HOLDINGS, INC.,
NEWSOUTH COMMUNICATIONS CORP.,
NUVOX COMMUNICATIONS, INC.,
TALK AMERICA INC., AND
XO COMMUNICATIONS, INC.**

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Allegiance Telecom, Inc., Cable & Wireless, ITC^DeltaCom Communications, Inc., KMC Telecom Holdings, Inc., NewSouth Communications Corp., NuVox Communications, Inc., Talk America Inc., and XO Communications, Inc., (hereinafter the "Competitive Coalition"), by their attorneys, hereby submit to the Federal Communications Commission ("FCC" or the "Commission") their Opposition to the Direct Case of BellSouth Telecommunications, Inc. ("BellSouth") submitted to the Commission on October 10, 2002 ("*Direct Case*"), pursuant to the Commission's Order released September 18, 2002,¹ in connection with BellSouth's Transmittal No. 657.² As a matter of administrative economy, the Competitive Coalition hereby requests that the Commission incorporate into the record of this proceeding the Competitive Coalition's Petition to Reject or, Alternatively, to Suspend and Investigate, filed with the Commission on July 26, 2002 ("*July 26, 2002 Petition to Reject*"), attached hereto as ***Exhibit A***. In addition, the Competitive Coalition requests that their "Petition to Reject or, Alternatively, to Suspend and Investigate" filed with the Commission on May 20, 2002 ("*May 20, 2002 Petition to Reject*"), attached hereto as ***Exhibit B***, in response to the

¹ *BellSouth Telecommunications Inc., Tariff FCC No. 1, Transmittal No. 657, Order, WC Docket No. 02-304, DA 02-2318 (rel. Sept. 18, 2002) ("Designation Order").*

² On August 2, 2002, the Commission suspended BellSouth's proposed tariff revisions for a five (5) month investigation period. *BellSouth Telecommunications, Inc., Tariff FCC No. 1, Transmittal No. 657, Order, DA 02-1886, rel Aug. 2, 2002 ("BellSouth Suspension Order").*

original BellSouth tariff revisions filed under Transmittal No. 635, also be incorporated into the record of the above-captioned docket.

I. INTRODUCTION AND SUMMARY

1. The proposed tariff revisions contained in BellSouth's Transmittal No. 657 represent BellSouth's third attempt to dramatically expand the scope of the security deposit requirements contained in its Tariff FCC No. 1. On August 2, 2002, the Commission suspended the proposed tariff revisions for a period of five (5) months and commenced investigation into the proposed revisions.

2. Among other things, the proposed revisions, if implemented, would permit BellSouth to impose security deposits on new as well as existing customers upon BellSouth's determination that the customer is not creditworthy, under a vague and arbitrary standard administered by BellSouth. As the Commission properly noted in its *Designation Order*, "[t]he proposed revisions to the security deposit terms significantly alter the balance between BellSouth and its intrastate access customers with respect to the risks of nonpayment of interstate access bills" that has remained in place for roughly the last twenty (20) years.³

3. If permitted to be implemented, these tariff revisions would provide BellSouth with the ability to unilaterally impose new and arduous deposit requirements (or their equivalent) on its interstate access customers, which could result in the shifting of millions of dollars of scarce working capital from BellSouth's carrier customers to their direct competitor, BellSouth.

4. BellSouth claims that these changes are necessary to protect it from the eminent risks and pitfalls resulting from "the current market volatility" now plaguing the

telecommunications industry in the wake of the bankruptcy filings of high profile carrier customers such as WorldCom and Global Crossing.⁴ However, BellSouth has not demonstrated that its current security deposit provisions have not provided it with sufficient protection or that they would not do so in the future, and BellSouth has not otherwise demonstrated circumstances that would justify the implementation of the proposed revisions. With its proposed tariff revisions, BellSouth seeks to use the frenzy surrounding certain bankruptcy proceedings – the most significant of which may in large part be attributable to fraud – as a means and justification for insulating itself from all business risk and for shifting that risk squarely onto its direct competitors at a time when many of them simply cannot bear the additional burden.

5. Indeed, the shift of capital contemplated by BellSouth's proposed tariffs is simply not accounted for in the business plans of its remaining competitors, and the extent to which such a capital shift could be supported by individual carriers at any point in the near future is highly doubtful. There simply is no compelling policy reason why the Commission should allow BellSouth to use regulation as a means of draining or eliminating its competitors and insulating itself from virtually any business risk.

6. BellSouth's Direct Case is, in large part, unresponsive to the issues set out for investigation by the Commission in its *Designation Order*. BellSouth fails to provide any substantial justification or reasonable support as to why the proposed tariff revisions are reasonable or justified and, in a number of cases, ignores the Commission's specific inquiries related to the tariff revisions.

³ *Designation Order* ¶ 10.

⁴ *Direct Case* ¶ 10.

7. In particular, the Competitive Coalition demonstrates below that (1) BellSouth has failed to provide a basis for expanding the scope of its ability to demand and extract a security deposit from its interstate access customers, and instead has sought Commission approval to shift the normal business risks associated with the sale of its highly profitable access services onto its direct competitors;⁵ (2) BellSouth has failed to explain the reasonableness of its security deposit refund provision; (3) BellSouth has failed to demonstrate how conducting dispute resolution arbitrations on a losing party pays basis does not unfairly burden its smaller competitors and is otherwise just and reasonable; and (4) BellSouth has failed to explain how the proposed tariff changes are not material changes to BellSouth's term contracts, or that they meet the substantial cause test for material changes, and are, nonetheless, reasonable for BellSouth to impose.

8. As stated in both the *May 20, 2002 Petition to Reject*, and reiterated in the *July 26, 2002 Petition to Reject*, permitting these revisions to take effect as filed by BellSouth, particularly in light of BellSouth's failure to provide adequate justification for their need, will cause significant and irreparable harm to its remaining direct competitors. As noted by Kim N. Wallace, Managing Director, Lehman Bros., Inc., at Chairman Powell's recent en banc hearing, "[t]he danger of attempting to adapt microeconomic policy to current conditions is that such policies always lag real-world events and invite high risks of unintended consequences."⁶

9. In summary, this Opposition to the Direct Case clearly demonstrates that BellSouth has not provided the prerequisite justification for the implementation of its proposed

⁵ To the extent risk associated with the Global Crossing and WorldCom bankruptcies could be characterized as extraordinary, it is inappropriate for BellSouth's competitors to bear the burden, as they did not share in the massive profits BellSouth has reaped and continues to reap from those IXCs.

⁶ *Telecommunications Reports*, Vol. 68, No. 38, Oct. 15, 2002.

tariff revisions and therefore, the Commission should not allow the proposed revisions to become effective.

II. ISSUES DESIGNATED FOR INVESTIGATION

A. **Basis for Requiring a Deposit from a Customer**

10. In its *Designation Order*, the Commission wisely acknowledges that, with respect to the risks of nonpayment, if permitted to implement the proposed tariff revisions, BellSouth will dramatically alter the balance between it and its interstate customers that was struck approximately twenty (20) years ago.⁷ In fact, with these tariff revisions, BellSouth is simply shifting the risk of nonpayment associated with the sale of its highly profitable access services away from itself and its investors and placing the entire risk on its interstate access customers. BellSouth admits this much in its *Direct Case*, stating that “[t]o leave the existing provisions in place puts the risk of default of BellSouth’s competitors upon BellSouth’s shareholders.”⁸ But that is precisely where the risk should be. BellSouth cannot be permitted to shift the risks associated with its business (which remains highly profitable) and demand that the Commission protect it and its shareholders from any market volatility, particularly since it is the shareholders that have reaped the benefits of the “balance” for the last twenty (20) years.

11. Specifically, in 2001, BellSouth’s claimed uncollectibles constituted only 1.4% of its interstate access revenues and did not stand in the way of BellSouth’s generation of a remarkable 21.22% rate of return on interstate services.⁹ Significantly, such an extraordinary rate of return was achieved during the same year that the number of individual defaults reported

⁷ *Designation Order* ¶ 10.

⁸ *Direct Case* ¶ 8.

by BellSouth was at its highest (22)¹⁰ and BellSouth's interstate access uncollectibles was at a twelve (12) year high (\$67,982,000).¹¹ As BellSouth's figures indicate, 2001 was the peak for defaults and, for carriers generally smaller than carriers such as Global Crossing and WorldCom (less than \$5,000,000, as indicated on Table 2), uncollectibles as well. During 2001, BellSouth also managed to generate remarkable profits of approximately \$4.2 billion, an *increase* of 22.3% from 2000.¹² But for the WorldCom and Global Crossing claims asserted by BellSouth, BellSouth's own data indicates a downward trend for defaults and uncollectibles. Simply put, there is no evidence that the current price cap regime or security deposit requirements need to be modified to provide BellSouth and its investors with additional protections.

12. Indeed, the information provided by BellSouth in Exhibit 2 to its *Direct Case*, demonstrates that the alleged risks that BellSouth now seeks Commission sanctioned assistance to guard against, are largely the result of two (2) carriers, namely Global Crossing and WorldCom, against whom BellSouth alleges a combined claim amount totaling \$137,979,642, or approximately 90% of its bankruptcy claims for 2002.¹³ Indeed, the remaining claims for 2002 total only \$14,669,651.¹⁴ BellSouth cannot be permitted to punish the entire industry for the

⁹ Designation Order ¶ 26 (citing WorldCom Petition at 16-17).

¹⁰ See *Direct Case* Table 2.

¹¹ See *Id.* Table 1. Notably, even BellSouth's overstated figures (CRIS and CABS billing is not limited to interstate services) represents a small portion of the total uncollectibles claimed by BellSouth. See *Direct Case* ¶ 19. (claiming overall uncollectibles in 2001 of \$362,166,000). BellSouth's figures demonstrate that, to the extent that it has a problem that needs addressing, that problem is largely not attributable to the suite of services sold under its FCC tariffs.

¹² See BellSouth Corporate Profile, Company Snapshot for 2001, U.S. Business Reporter. http://www.activemedia-guide.com/profile_bellsouth.htm.

¹³ *Id.* Exhibit 2.

¹⁴ *Id.* It is important to note that these figures are merely BellSouth's bankruptcy claims and there is no indication that they are valid or that they exclude legitimately disputed amounts. Further, it is more than likely that the bankruptcy claims set forth by BellSouth do not reflect the amounts owed to the carrier by BellSouth for services rendered, such as transport and termination services. Finally, BellSouth

actions of the few, particularly when these carriers' financial demise is surrounded by a cloud of accusations of fraud, by shifting the normal risks of business from BellSouth's shareholder to its customers. Moreover, BellSouth's assertions of impending losses, as a result of various bankruptcy filings, are, as BellSouth acknowledges, not losses.¹⁵ BellSouth almost certainly has demanded payments and has extracted cures (lawfully or not) as a condition of uninterrupted service (lawful or not). Indeed, other carriers admit that they have been able to recover at least some portion of pre-petition debts from carriers such as WorldCom.¹⁶

13. There can be little doubt that BellSouth is handsomely compensated and insulated from the risks of nonpayment by the rates it assesses on carriers under price caps.¹⁷ Indeed, BellSouth declines the Commission's invitation to demonstrate a problem with price caps or to suggest a fix.¹⁸ BellSouth has been operating under the current price caps regime for twenty (20) years and has generated billions of dollars in revenues and profits.¹⁹ BellSouth's own reluctance to change the system that has permitted it to generate enormous returns²⁰ and makes it clear that what BellSouth is seeking to do is to guarantee these extraordinary profits by asking the Commission to place all risk associated with its operations on BellSouth's direct competitors. Yet, there is no compelling reason for BellSouth to now demand or receive additional protections

demonstrates no relationship between these figures and its FCC tariffs or the revisions it proposes to make thereto.

¹⁵ Tellingly, BellSouth refuses to share with the Commission the amount of claimed uncollectibles it has recovered. *Id.* n.11 (acknowledging that, "[a]ll of the proceedings [in Exhibit 2] remain open, so BellSouth cannot calculate the percentage recovered").

¹⁶ "WorldCom Extends Verizon Billing Pact," *TR Daily*, Sept. 4, 2002 ("WorldCom will pay to Verizon \$34.5 million that it owed the company prior to entering bankruptcy proceedings in July.").

¹⁷ See *Designation Order* ¶ 11.

¹⁸ See *Direct Case* ¶ 20.

¹⁹ See J. Lee July 1, 2002 Letter.

from market risks not already accounted for in the price cap regime. Despite BellSouth's assertion to the contrary, instability in the telecommunications industry has been around since the 1980s when the first Bell monopoly was broken up. Since then, the market has experienced periods of growth and loss. BellSouth should not be permitted now to guard against normal market changes it has successfully insulated itself from for the last twenty (20) years.

14. Furthermore, the figures provided by BellSouth clearly indicate that the height of the alleged problems associated with the greatest number of competitive carriers (uncollectibles under \$5,000,000) was actually in 2001, as the number of defaults alleged by BellSouth is on track to drop significantly in 2002.²¹ Thus, if commerce did not grind to halt in 2001 – it did not – it is highly doubtful that “commerce would grind to a halt” without the revisions in 2002, as BellSouth alleges.²²

15. Tellingly, BellSouth admits that, under the current regime, it only holds \$16 million in deposits, compared to the \$297 million in monthly charges.²³ This figure provided by BellSouth strongly suggests that BellSouth has not fully utilized the deposit provisions currently available to it under its existing tariff. BellSouth provides the Commission with no justification or even explanation as to why the current provisions do not guard against the risks, even though they apparently have done a sufficient job for the previous twenty (20) years.

²⁰ See BellSouth Corporate Profile. (Profits for 2001 were approximately \$4.2 billion, an increase of 22.3% from 2000).

²¹ According to *Direct Case* Table 2, the number of individual defaults was at its highest in 2001 with twenty-two (22), nineteen (19) of which were associated with carriers with uncollectibles of less than \$5,000,000. That same year, BellSouth's interstate access uncollectibles was at a twelve (12) year high with \$67,982,000, and its overall uncollectibles reached \$362,166,000. As these figures indicate, 2001 was the peak for bad debt and uncollectibles.

²² *Id.* n.6.

²³ *Id.* n.8.

16. When asked by the Commission for figures for individual default groups, BellSouth claims that it does not track data in the manner requested by the Commission and could only “estimate individual defaults for the ranges requested by the Commission for its wholesale customers only using data it has on bankruptcies and bad debt write offs.”²⁴ From this lack of information and effort, it is evident that BellSouth does not even know how big the alleged problem that it is seeking Commission assistance to guard against actually is, or whether the existing tariff provisions could not provide sufficient protections. The figures provided by BellSouth in its *Direct Case* in Table 2 demonstrate that the number of customers in default in 2002 (or having uncollectibles) is actually less than half the total for 2001. It appears that the increases in uncollectibles that BellSouth believes is reflective “of the upheaval within the telecommunications industry,” amount to nothing more than a dramatic dip in the business cycle in 2001 (following a dramatic upswing in the business cycle) which already is correcting itself in 2002.

17. In its *Designation Order*, the Commission made inquiries into BellSouth’s billing and collection practices, seeking to better understand a potential relationship between them and BellSouth’s alleged increase in the level of uncollectibles.²⁵ Instead of providing the Commission with an explanation of its billing and collection processes and/or the accounting treatment of disputed amounts, as requested, BellSouth chose to avoid this specific request and instead provided the Commission with a vague and ambiguous comparison of its CABS and CRIS billing systems. Notably, BellSouth readily admits that it has made no change to its billing

²⁴ *Id.* ¶ 19.

²⁵ *Designation Order* ¶ 12.

systems²⁶ which surely is a main driver of its current accounting and revenue realization problems.²⁷

18. The information provided by BellSouth also demonstrates that BellSouth could certainly take steps to speed payments from competitors and limit its exposure from past due payments. BellSouth readily admits it takes six (6) to seven (7) days from the time a bill is issued to the time BellSouth sends it to a customer.²⁸ Although data collected by NuVox shows that it takes on average nearly ten (10) days for it to receive its bills from BellSouth, there is now no doubt that some mysterious processes inside BellSouth eliminate approximately one (1) week of a customer's time to review and make payments on BellSouth's bills. BellSouth's bills are typically riddled with errors and review of these bills has become a complex time and resource consuming process (in fact, it has become an industry). If BellSouth is concerned about timely receipt of payments from its customers, BellSouth should strive to issue bills faster and more reliably, thus providing its customers with more time to review, make payments, and if necessary, dispute charges contained therein.

19. Nonetheless, BellSouth has additional protections to ameliorate the risks associated with delayed payments. These protections come in the form of late payment charges

²⁶ *Direct Case* ¶ 22.

²⁷ See, e.g., "Shareholder Class Action Filed Against BellSouth Corporation," *CNNMoney*, August 19, 2002, <http://money.cnn.com/services/tickerheadlines/prn/phm017.P2.08192002132458.11025.htm> (alleging that BellSouth reported quarter after quarter of "record" financial results and financial growth while unbeknownst to the investing public, BellSouth had been recognizing advertising and publishing revenues, purportedly in connection with the performance of services for customers who had not been billed, requiring that \$163 million of this revenue be reversed and that the GAAP were violated because the above-mentioned transactions were not complete causing a lack of an appropriate provision for uncollectible accounts).

²⁸ *Direct Case* Exhibit 1.

on delinquent payments at the rate of 1% per month (.000329 per day) or 12% annually.²⁹ It is precisely this mechanism that provides BellSouth with the necessary protections in cases where it actually extends credit to late payers.

20. In the *Designation Order*, the Commission inquired about possible changes in customer behavior (which BellSouth had at one point alleged) and requested that BellSouth provide it with the percentage of carrier bills disputed, billed revenue disputed and disputed amounts adjusted.³⁰ BellSouth's own data provided in Exhibit 1 indicates that an alleged increase in billing dispute amounts is not occurring in 2002. According to BellSouth's data, the rate of disputes has been decreasing since the height of disputes in 2001.³¹ Under the terms of the tariff, customers are permitted to dispute charges on their bills. In fact, it is not unusual for a carrier under BellSouth's interstate access tariff to dispute ten-to-twenty percent or more of the charges each month. In most cases, the charges in dispute are found to be in the challenging carrier's favor. In fact, one member of the Competitive Coalition conducted a survey that revealed that it has been successful in its billing disputes with BellSouth approximately 85% of the time.³² Nevertheless, the frequency and level of billing dispute challenges is not an indicator of an increase in BellSouth uncollectibles. Rather, it is likely a strong indicator that BellSouth's billing systems may be contributing to a significant overstatement of earned revenues by BellSouth.

²⁹ See Section 2.4.1 (B)(3)(b), BellSouth Tariff FCC No. 1 (eff. Mar. 24, 2000).

³⁰ *Designation Order* ¶ 12.

³¹ Furthermore, BellSouth shows no correlation between customers disputing amounts on their bills and uncollectibles or that imposing security deposits will eliminate the problem of uncollectibles. *Direct Case* ¶ 20 ("the fact that a customer provides BellSouth with a deposit under the revised provisions will not eliminate uncollectibles").

³² See *July 26, 2002 Petition to Reject* at 5.

21. The Commission also inquired into BellSouth's billing of services in advance or in arrears.³³ BellSouth's limited responses provide evidence that BellSouth already has in place more than the necessary protections to guard against risk of nonpayment. According to *Direct Case* Exhibit 2, for 2002, BellSouth bills 89% of its services in advance. This figure has changed dramatically over the last five (5) years with the percentage of services billed in advance nearly doubling since 1998 when BellSouth only billed 48% of its services in advance.³⁴ There is inherently less risk associated with billing in advance than there is associated with billing in arrears. With more billings in advance than ever before, BellSouth likely is benefiting from its highest level of protection since the existing deposit provisions were adopted.

22. The Commission appropriately inquires into the actual cause of BellSouth's alleged increase in risk in uncollectible debts.³⁵ Notably, BellSouth provides no compelling answer, pointing to bankruptcy claims that tell little with respect to amounts billed pursuant to its FCC tariff and remaining uncollected. As stated above, BellSouth cannot be permitted to punish the entire industry and impose burdensome security deposit requirements simply because a few carriers have experienced unanticipated bankruptcies resulting in large amounts claimed by BellSouth. Moreover, based on the charts provided in Exhibit 2, it is evident that with the exception of the bankruptcies filed by Global Crossing and WorldCom, two bankruptcies surrounded in a cloud of mismanagement and fraud, the amount of bankruptcy claims for 2002 would only be \$14,669,651 (\$152,649,293 [2002 total] - \$117,000,000 [WorldCom] - \$20,979,642 [Global Crossing]), significantly less than claims for 2001 (\$24,984,445). Focusing

³³ *Direct Case* ¶ 13.

³⁴ *Id.* Exhibit 2.

³⁵ *Designation Order* ¶ 14.

further on carriers against whom BellSouth has claims of less than \$5,000,000, the amount of BellSouth's bankruptcy claim would be further reduced to \$8,851,392 (subtracting out the claim for Network Access Solutions [\$5,818,259] in addition to the claims associated with WorldCom and Global Crossing). Thus, even if BellSouth were able to prove that it had fully taken advantage of current tariff protections and they had proven insufficient, BellSouth data do not show that there is a rampant and still growing problem that prevents it from securing a healthy rate of return on its interstate services.

23. In its response to the Commission's inquiry as to whether BellSouth could adopt some form of advanced payment,³⁶ BellSouth stated that "modifying existing billing processes present a significant additional cost to BellSouth. Before investigating the feasibility of such changes, BellSouth would have to have a reasonable expectation that such changes would received regulatory acceptance."³⁷ BellSouth cannot realistically expect to have the Commission provide it with a free fix or to have the Commission tell it in advance that it would approve such a change before even investigating its feasibility. Nevertheless, the Competitive Coalition has demonstrated that changes in BellSouth's billing, such as accuracy and timeliness, are needed and BellSouth has not demonstrated the need for implementing an advanced payment mechanism, especially in light of the fact that BellSouth already bills almost 90% of its services in advance.

24. In addition, BellSouth's assertion that the alternatives offered to provide a security deposit, such as providing a security interest in a tangible asset or a surety bond, would

³⁶ *Id.* ¶ 14

³⁷ *Direct Case* ¶ 22.

not constitute harm to a cash strapped industry is wrong.³⁸ Surety bonds and letters of credit are expensive to maintain.

25. The Commission requested that BellSouth “explain how each of these factors [used by BellSouth to determine a customer’s creditworthiness] is a valid predictor of whether the carrier will pay its interstate access bill.”³⁹ BellSouth has not demonstrated how any of the factors it proposes to use to determine whether a security deposit will be required are valid predictors of the likelihood of a customer paying its access bill. Indeed, it fails to elaborate on most of the individual elements it proposes to utilize in its own test. As stated in both the *May 20, 2002 Petition to Reject* and the *July 26, 2002 Petition to Reject*, the criteria selected to determine creditworthiness provides BellSouth with too much subjective discretion in determining whether or not to require its customers, most of whom are direct competitors with BellSouth in the local and long distance market, to provide a security deposit. As currently proposed, BellSouth can easily implement the vague criteria in a discriminatory and anticompetitive manner. BellSouth may deem controlling, any one of the factors, like its wholly subjective grading of the customer’s management team, or rely totally on the opinions of another, such as a Wall Street evaluator, for a debt rating, as the basis for determining a security deposit instead of actual payment histories, which is what even some of the models it proposes to use appear in some part to be based on.⁴⁰

³⁸ *Id.* ¶25.

³⁹ *Designation Order* ¶ 15.

⁴⁰ *Direct Case* ¶ 31 (“[o]f course, the models are based on historical data”).

26. In addition, BellSouth's selection of the criteria and the threshold of a score of 5 or better for not triggering a security deposit, is totally arbitrary.⁴¹ BellSouth has not provided any justification as to why a score of 5 or less is relevant to or indicative of a carrier's likeliness to cease paying BellSouth in a timely manner. In fact, RAM scores for both BellSouth Corporation and BellSouth Long Distance, Inc. ("BSLD") are barely passable, under BellSouth's arbitrary cut-off.⁴² The Competitive Coalition, however, finds it highly unlikely that BellSouth would impose a security deposit on BellSouth Corp. or BSLD or that they pose a significant threat of nonpayment. Notably, BellSouth did not provide a complete application of its creditworthiness screen to BellSouth Corp. or BSLD. BellSouth's creditworthiness screen includes a number of other factors including what essentially amounts to a reservation of rights to take into account whatever information it wants – unsubstantiated, unrelated or not – into account. For example, recent credit downgrades for BellSouth Corp. and the newness of BSLD as a BellSouth Telecommunications customer suggest that, if these entities were unaffiliated with BellSouth Telecommunications, they might not pass the test.⁴³

27. The Commission correctly points out in its *Designation Order* that BellSouth has not shown how the factors it will use to determine the need for a security deposit are better indicators of a customer's ability to pay than a customer's past payment history.⁴⁴ In its *Direct Case*, BellSouth again fails to demonstrate how the new criteria are better. Past payment histories are easily measured and for years have proven a solid indicator of a party's ability and

⁴¹ See *July 26, 2002 Petition to Reject* at 6.

⁴² *Direct Case* n.17.

⁴³ See "Moody's Cuts BellSouth Outlook; Eyes Other Bell Debt Ratings," *TR Daily*, August 8, 2002.

⁴⁴ *Designation Order* ¶ 15.

willingness to pay its bills. If payments have been consistently made, the customer's payment history can then be used to determine when the security deposit should be returned.

28. In the *Designation Order*, the Commission inquired about payment characteristics of defaulting interstate access customers during the year prior to the ninety (90) days in default and any other payment patterns that may be identified that would allow BellSouth to trigger the security deposit requirements already in place.⁴⁵ Instead of providing the Commission with specific information, BellSouth stated that it "did not track customer data in this manner," providing only a cryptic assertion that "recent experience is that there is little time between a customer defaulting on its bills and seeking bankruptcy protection."⁴⁶ Here, the Commission essentially has asked BellSouth to substantiate its claim that the existing deposit provisions have been used and have failed to protect – and, rather than substantiate its claim, BellSouth simply asks the Commission to take its word in place of fact. Obviously, more compelling evidence should be required to upend a regime that has worked well for approximately twenty years.

29. Finally, the Commission also inquired about the level of uncollectibles of other regulated utilities or the broader marketplace, and what they do to lessen the risk of default. Though requested to do so, BellSouth opted not to respond to these inquiries.

B. Refund of Deposits

30. Recognizing the concerns of the commenters, the Commission questioned the reasonableness of BellSouth's policy on deposit refunds.⁴⁷ In its *Direct Case*, BellSouth fails to demonstrate that its refund policy, as proposed in its tariff revisions, is reasonable. In a time

⁴⁵ *Id.* ¶ 16.

⁴⁶ *Direct Case* n.18.

where working capital is scarce and the availability of additional investment capital is nearly impossible for carriers to secure, it is reasonable for BellSouth's interstate access customers to want to govern their conduct in a manner that will ensure that they will receive their security deposit back upon meeting a set threshold, such as making timely payments for a twelve (12) month period. Otherwise, carrier customers can never count on a refund of a security deposit amount and it becomes a matter entirely entrusted to the unilateral discretion of a direct competitor, BellSouth. Without an unambiguous deposit refund threshold, BellSouth's proposed deposit refund policy is unreasonable.

C. Dispute Resolutions

31. The main flaw in BellSouth's position regarding the proposed dispute resolution arbitration provisions is, as the Commission correctly notes, that there is no unambiguous standard by which the arbitrator could render a decision.⁴⁸ As stated in the *May 20, 2002 Petition to Reject* and the *July 26, 2002 Petition to Reject*, while the Competitive Coalition believes that any revision to the tariff, especially the imposition of a security deposit that has the potential of tying up scarce working capital, warrants the inclusion of a dispute resolution provision. Given the uncertainty how the dispute resolution provision will be implemented and the standards by which the arbitrator is to render the decision, adoption of BellSouth's "loser pays" dispute resolution provision is inappropriate.

32. As the commenters have stated in the record, the Commission also correctly points out that the requirement that the losing party pay all of the arbitration costs could

⁴⁷ *Designation Order* ¶ 20.

⁴⁸ *Id.* ¶ 25. In addition, it is entirely unclear who would be the losing party if the arbitrator did not rule entirely in one party's favor.

significantly alter the balance between BellSouth and its customer.⁴⁹ BellSouth's statement and supporting arguments that the requirement that the losing party pay the arbitration costs does not alter the balance between BellSouth and the customer is nonsense.⁵⁰ Many carriers, when faced with the possibility of paying not only for their own attorney's preparation, a cost which they can "limit" by setting a budget, but also BellSouth's attorney fees and preparation costs, which could be considerably higher, might not even bring a dispute against BellSouth, despite their likelihood of success.⁵¹ BellSouth cannot be permitted to seek from the Commission a sanctioned silencing of a carrier's right to dispute based on the potential costs associated with the "loser pays" system.

33. BellSouth claims to find support for implementing the losing party pays structure in AAA Rule R-45(c), which states that the arbitrator shall assess the fees and apportion them as the arbitrator deems appropriate.⁵² Contrary to its claim,⁵³ this provision does not support BellSouth's "losing party pays" provision. In addition, another rule, AAA Rule R-52, provides that each party will bear its own costs associated with putting on its case and that the parties shall split the costs of the arbitrator, AAA representative and the costs resulting from the direct request of the arbitrator. In full, Rule R-52 provides:

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representative, and any witness and the cost of any proof produced

⁴⁹ *Id.*

⁵⁰ *Direct Case* ¶ 39 (claiming that "[n]othing could be further from the truth" when discussing the shift of balance between the parties under the losing party pays scenario).

⁵¹ *Designation Order* ¶ 25.

⁵² Specifically, AAA Rule R-45 (c) states in full: "In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-51, R-52, and R-53. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate."

⁵³ *See Direct Case* ¶ 40.

at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

This rule also does not support the proposition that the “losing party pays” for all of the costs associated with the arbitration, as BellSouth claims it does. Rather, the rule, which allows for the parties to “agree otherwise” is with respect to the *arbitrator’s costs*; it has nothing to do with the losing party paying the winning party’s costs incurred during the arbitration. The Commission should not allow BellSouth to override this particular AAA rule (and other applicable rules) as it has sought to do with its “losing party pays” provision.

D. Application of Revised Deposit Requirements on Term Plan Customers

34. The Commission correctly acknowledges in the *Designation Order* that the requirement of providing a new or increased security deposit to BellSouth would significantly reduce the carrier’s working capital, which could also affect other capital or loan commitments the customer has.⁵⁴ The Competitive Coalition agrees with the Commission’s assertion that implementing the change to BellSouth’s tariff would be a serious destabilizing event in the competitive marketplace, and that the new security deposit requirements, if implemented, could potentially cause the carrier to need to restructure or terminate some services, which would, in turn, trigger a termination penalty to be assessed by BellSouth.⁵⁵

35. Throughout its *Direct Case*, BellSouth asserts that the tariff revisions it proposed are “minor” and thus will not have a significant impact on BellSouth’s term plan or other

⁵⁴ *Designation Order* ¶ 27.

⁵⁵ *Id.*

customers.⁵⁶ The fact that BellSouth filed variations of its proposed tariff revisions three times with the Commission indicates that BellSouth clearly is anticipating more than a minor benefit from their imposition. Indeed, if the proposed changes were so minor, Competitive Coalition members would have not challenged them from the beginning, spending considerable time and money to prevent their implementation. Clearly, the fact that so many parties submitted a *Petition to Reject or, in the Alternative, Suspend and Investigate*, the fact that BellSouth filed these revisions multiple times with the Commission, and the fact that the Commission issued its *Suspension Order*, indicate that these changes are not minor but rather are substantial changes that could have a dramatic and debilitating effect on BellSouth's competitors and the broader telecommunications marketplace.

36. As demonstrated previously, the changes proposed by BellSouth to its tariff revisions are indeed material changes that impact BellSouth's term plan customers.⁵⁷ Material changes, according to Commission precedent cited to by BellSouth, include those changes that have a direct impact on the performance or the overall structure of the contract, such as guarantees and other provisions, which impact the customer's fundamental legal obligations and rights under the contract.⁵⁸ The change in the deposit requirement is not merely a credit issue as BellSouth asserts, it is, as the Commission points out, a reduction in working capital, which would be a serious destabilizing event in the competitive marketplace.⁵⁹

⁵⁶ E.g., *Direct Case* ¶¶ 49, 54.

⁵⁷ See *July 26, 2002 Petition to Reject* at 8; see also *May 20, 2002 Petition to Reject* at 9.

⁵⁸ *Direct Case* ¶ 48.

⁵⁹ *Designation Order* ¶ 27.

37. Furthermore, despite its efforts to find support to the contrary, BellSouth's justifications do not pass under the Substantial Cause Test established in *RCA American Communications, Inc.*⁶⁰ BellSouth's explanation that the events of bankruptcy were unforeseeable is wrong.⁶¹ As stated above, there has been some level of uncertainty in the telecommunications market since the 1980s when the first Bell monopoly was broken up. The current telecommunications market has not created a new level of harm to BellSouth. Indeed, BellSouth's returns remain impressive and prove that it is not experiencing any new trends in the telecommunications industry that warrant additional protection.

38. As acknowledged by the Commission, changes in the security deposit structure would have a significant impact on BellSouth's customers' working capital levels, as well as their capital and loan commitments.⁶² BellSouth cannot claim that these changes are not material. BellSouth has not satisfied the requirements under the Substantial Cause Test to warrant implementing the changes to its tariff.

⁶⁰ *RCA American Communications, Inc.*, Memorandum and Order, 84 FCC 2d 353, 358 (1980); *id.*, 86 FCC 2d 1197, 1201 (1981); 94 FCC 2d 1338, 1340 (1983).

⁶¹ *Direct Case* ¶ 53.

⁶² *Designation Order* ¶ 27.

III. CONCLUSION

39. For the foregoing reasons, BellSouth has not provided the Commission with substantial justifications in its *Direct Case* to warrant implementing its proposed tariff revisions to Tariff FCC No. 1 submitted in Transmittal No. 657. Therefore the Commission should deny BellSouth's request to modify its Tariff FCC No. 1.

Respectfully submitted

**ALLEGIANCE TELECOM, INC.,
CABLE & WIRELESS,
ITC^DELTA COM COMMUNICATIONS, INC.,
KMC TELECOM HOLDINGS, INC.,
NEWSOUTH COMMUNICATIONS CORP.,
NUVOX COMMUNICATIONS, INC.,
TALK AMERICA INC., AND
XO COMMUNICATIONS, INC.**

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Date: October 24, 2002


CERTIFICATE OF SERVICE

I, Erin W. Emmott, hereby certify that, on this 24th day of October 2002, a copy of the foregoing ***Opposition to the Direct Case of BellSouth Telecommunications, Inc.*** in WC Docket No. 02-304, was sent, as indicated, to the following individuals:

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